In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1193

FRANK COTRONI AND FRANK DASTI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) is reported at 527 F. 2d 708. The opinion of the district court on petitioners' pretrial motion to suppress evidence (Pet. App. C) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on December 22, 1975. On January 13, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to February 20, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of summaries and transcripts of telephone conversations intercepted by Canadian police

within their territorial jurisdiction and without the participation of United States officials violated the Fourth Amendment.

2. Whether the admission of such evidence violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners, both Canadian citizens, were convicted of conspiracy to import cocaine into the United States and of receiving and concealing cocaine, in violation of 21 U.S.C. (1964 ed.) 173 and 174. Petitioner Cotroni was fined $20,000 and sentenced to concurrent terms of fifteen years' imprisonment; petitioner Dasti was sentenced to concurrent terms of fifteen years' imprisonment, to be served concurrently with a prior sentence then being served.

As shown by the testimony of co-conspirators, police surveillance reports, and hotel and airline records, petitioners conspired to import cocaine from Mexico for distribution in New York City (Pet. App. 2a). Important corroborative evidence was furnished the prosecution by the Royal Canadian Mounted Police (*id.* at 2a-3a).

Beginning in July 1970, as part of a general gambling investigation extending over a three-year period, Canadian provincial police officials electronically monitored telephone conversations in petitioners' homes and a sporting club (Pet. App. 3a, 11a-12a). These interceptions were valid under Canadian law, which at that time contained no provision making the recording of telephone calls illegal (Pet. App. 3a, 14a-18a).[1] When the monitoring dis-

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[1]Under the Protection of Privacy Act of June 30, 1974, the unauthorized, willful interception of "private communications" is now a criminal offense in Canada. However, that statute does not apply retroactively (Pet. App. 3a, 14a-15a).

closed the existence of narcotics trafficking involving American citizens, the Quebec police notified the Royal Canadian Mounted Police, which in turn contacted the Montreal office of the Drug Enforcement Administration (A. 1555-1556, 1572). The Canadian authorities recorded various conversations relating to the instant narcotics importation scheme in December 1970 and January 1971 (Pet. App. 3a).

Prior to trial, petitioners moved to suppress the evidence obtained from those conversations on the grounds, *inter alia*, that United States officials had participated in the seizure of those conversations, in violation of the Fourth Amendment, and that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*) applied to conversations intercepted outside the territorial boundaries of the United States that had traveled in part over the domestic interstate telephone system.

The district court found that the Canadian police had permitted an agent of the Drug Enforcement Administration access to the recordings of conversations concerning petitioners' American narcotics activities which it had intercepted (Pet. App. 13a). But apart from that agent's review of information obtained from those conversations, the court found that the United States government had not participated in the Canadian police investigation (*id.* at 14a):

> The United States government did not in any way initiate, supervise, control or direct the wiretapping. It did not supply any equipment or funds. It did not supply any leads. This government had no role in the investigation except the exchange of information.

Therefore, the court concluded that the government had not violated the Fourth Amendment and refused to exclude the evidence (*ibid.*). Moreover, it found that Title

III does not bar the admission of conversations intercepted outside the United States in non-compliance with its provisions, even though those calls utilized the domestic interstate telephone network (Pet. App. 19a-20a).

The court of appeals specifically adopted the district court's finding that the United States government did not " 'in any way initiate, supervise, control or direct the wiretapping' " (Pet. App. 6a) and affirmed its holding that government officials had not participated in the seizure of these conversations (*ibid.*). The court also held that Title III applies only to interceptions occurring within the territorial jurisdiction of the United States (Pet. App. 4a-5a).

ARGUMENT

1. Petitioners contend (Pet. 7, 12-13) that the admission into evidence of information obtained from the intercepted telephone conversations violated the Fourth Amendment. In essence, they argue that there was a sufficient degree of participation by United States officials in the Canadian monitoring program that the entire effort should be attributed to the United States government for Fourth Amendment purposes. They implicitly assert that the failure of the Canadian police to obtain a warrant from a judicial officer before initiating the interceptions (which was not required by Canadian law but would have been required if the recordings had been made in this country) rendered the resulting seizures illegal under the Fourth Amendment and required exclusion of all information obtained from those conversations at trial.

The United States Constitution does not govern the actions of a foreign sovereign acting on its own account in the enforcement of its laws within its territorial jurisdiction. See *Birdsell* v. *United States*, 346 F.2d 775

(C.A. 5), certiorari denied, 382 U.S. 963; *Wentz* v. *United States*, 244 F.2d 172, 176 (C.A. 9), certiorari denied, 355 U.S. 806. It follows that the Fourth Amendment, as enforced by the judicially created exclusionary rule, does not apply to evidence seized by foreign governmental authorities within their country if the evidence is not tainted by conduct of American officials that would be illegal in this country. *Birdsell* v. *United States*, *supra*; *Stonehill* v. *United States*, 405 F.2d 738 (C.A. 9), certiorari denied, 395 U.S. 960; *United States* v. *Toscanino*, 500 F.2d 267, 280 n. 9 (C.A. 2).[2]

Moreover, in the search-and-seizure context, the primary purpose of the exclusionary rule "is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Michigan* v. *Tucker*, 417 U.S. 433, 446. By refusing to admit evidence seized in violation of the Fourth Amendment, "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Id.* at 447. But this Court has not required adherence to the rule where its application would not compel "respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217.[3]

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[2]Indeed, we question whether conduct of American officials in foreign countries directed at foreign nationals would violate the United States Constitution if undertaken in conformity with applicable foreign law, but since there was no such conduct here, the question is not presented.

[3]The "imperative of judicial integrity" rationale does not provide an independent basis for exclusion of evidence seized by foreign officials, not subject to our Constitution, in a search sanctioned by their domestic law and conducted in a manner which the court of appeals found did not "shock the conscience" of the court asked to admit that evidence (Pet. App. 6a, n. 10). See *Michigan* v. *Tucker*, *supra*, 417 U.S. at 450, n. 25; *United States* v. *Nagelberg*, 434 F. 2d 585, 587 n. 1 (C.A. 2), certiorari denied, 401 U.S. 939.

There is no reason to believe—and petitioners have not suggested—that the exclusion in an American court of evidence seized by foreign police officials during investigations designed to enforce their own criminal laws would create an incentive for them to conduct their investigations according to our procedural standards. See *United States* v. *Welch*, 455 F.2d 211 (C.A. 2); *United States* v. *Nagelberg*, 434 F.2d 585, 587 n. 1 (C.A. 2), certiorari denied, 401 U.S. 939; *Birdsell* v. *United States*, *supra*. Thus, the sole justification consistent with the purpose of the exclusionary rule for granting the relief petitioners seek in this case would be if there were substantial participation by United States officials in the searches.

But both lower courts have found that the only connection of federal officials with the seizures conducted by the Canadian police was in reviewing the recordings or summaries of conversations after they had been intercepted (see pp. 3-4, *supra*). Petitioners' sole argument (Pet. 7, 12-13) on this branch of the case is directed toward challenging this factual finding concerning their degree of participation.[4] Review of the correctness of the concurrent

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[4]The question of the degree of federal participation in a search by foreign officials necessary to invoke the Fourth Amendment is analogous to the problems arising from the use in federal court of evidence illegally seized by state officials prior to the rejection of the "silver platter doctrine." See *Elkins* v. *United States*, *supra*. The cases interpreting that doctrine are distinguishable, however, because both state and federal officers are subject to the Constitution, while foreign governmental agents working in their own countries are not. See *Stonehill* v. *United States*, *supra*, which required a showing of substantial participation by American officials in an extra-territorial search before the exclusionary rule could be invoked (405 F.2d at 743).

In any event, this Court need not consider the extent to which pre-*Elkins* cases apply to searches by foreign officials outside the United States. The findings of the courts below that government agents did not "initiate, supervise, control or direct" the monitoring permits introduction of the evidence so obtained under any conceivable formulation of the extra-territorial participation rule.

findings of fact of the courts below is foreclosed in the absence of an exceptional showing of error. See, *e.g.*, *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. Petitioners' failure to make any such showing makes further review inappropriate.[5]

2. Petitioners also contend (Pet. 14) that the extra-territorial recordings of their telephone conversations should have been suppressed for failure to comply with the provisions of Title III. To the extent that this proposition is based on the contention that the United States actively participated in the Canadian monitoring program (Pet. 14, 17-18, 20), it is answered by the arguments set forth above. To the extent it rests on the assertion that Title III applies to conversations lawfully intercepted by officials of a foreign government outside the United States, but which, in part, utilized our domestic telephone transmission system, the argument was properly rejected by the court in *United States* v. *Toscanino, supra,* 500 F.2d at 279-280.

As the court of appeals concluded (Pet. App. 4a), Title III was intended to regulate the act of interception of wire or oral conversations, not the system of communications

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[5]That the Canadian police never utilized the information obtained from their three-year gambling investigation in a Canadian criminal prosecution does not, as petitioners contend (Pet. 13), demonstrate that the monitoring program was not conducted for purposes of enforcing Canadian law but was merely an accommodation to United States officials. Both lower courts found that the interception program was an integral part of a legitimate Canadian criminal investigation, which began several months before detection of American narcotics activity and continued for a substantial period after the consummation of the instant conspiracy. Nor did the use of information obtained from the monitoring to prompt other investigative efforts, including physical surveillance of petitioners, demonstrate that the Canadian police had no legitimate domestic interest in their investigation.

facilities. Moreover, the statute contains no provision governing the interception of conversations outside the United States. *United States* v. *Toscanino*, *supra*.[6] The holding of the court below comports with the canon of construction that, unless a contrary intent appears, federal statutes apply only within the territorial jurisdiction of the United States. *Foley Brothers, Inc.* v. *Filardo*, 336 U.S. 281, 285.

Moreover, the court of appeals adopted the only interpretation of the legislative intention compatible with a functional statutory scheme. The Canadian police, even if they had desired to do so, could not have complied with the requirements of Title III before recording these conversations. 18 U.S.C. 2518(3) empowers a judge of competent jurisdiction to authorize the interception of wire communications only within the territorial jurisdiction of his court. Since these conversations were not intercepted within this country, no American judge could have issued a proper intercept order. The lack of procedures for extra-territorial interceptions confirms that Congress did not intend to give extra-territorial effect to Title III.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

MAY 1976.

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[6]While it may be that the intercepted conversations were "wire communications" as defined in Section 2510(1) because they traversed domestic facilities, this does not help petitioners, since it sheds no light on the question whether Congress intended to extend the prohibitions against interceptions of "wire communications" to acts occurring outside the United States. Petitioners' suggestion that the definition supports their position (Pet. 16) is unsupported.